88-1371

No. .....

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

KEITH E. ELLIS, LINDA ELLIS, DENNIS HODNETT, SANDRA W. HODNETT and THOMAS L. CURRY,
Petitioners,

vs.

CONSOLIDATED DIESEL ELECTRIC CORPORATION and CONDEC CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1989

QUESTIONS PRESENTED

1. Can State law be displaced in a products liability case involving military equipment where the Trial Court excuses the failure of the supplier to warn the United States Army of dangers in the use of the equipment because the United States Army was "capable of being knowledgeable" concerning the dangers in the use of the equipment and because the alleged defect or hazard in the equipment was "open and obvious".

LIST OF PARTIES

The caption of the case contains the names of all parties in the Court except LTV Corporation and Vought Corporation who were named as Defendants. A separate appeal involving these two Defendants is currently pending in the United States Court of Appeals for the Tenth Circuit.

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I. This Court has recently held that in order for State Law to be displaced in a products liability action involving military equipment, the supplier of the equipment must show that it warned the United States of dangers in the use of the equipment known to it but not known to the United States. The Petitioners presented competent evidence to demonstrate a design defect in the military equipment in question. The Respondents also failed to show that the United States Army had actual knowledge of the defect. Rather, The Trial Court held that it was not necessary for the supplier to warn the Army of potential dangers in the use of the military equipment in question because the Army was "capable of being knowledgeable" concerning the dangers in the use of the equipment and further, the defect or hazard was "open and obvious".

Accordingly, this writ must be granted because the Trial Court engaged in an unauthorized departure from this Court's holding in *Boyle vs. United Technologies*, 108 S.Ct. 2510 (1988) the *Boyle* case does not make any provisions for the supplier to be excused from its duty to warn based on a finding by the Trial Court that the United States is "capable of being knowledgeable" about an alleged defect. Furthermore, the Trial Court departed from the standards

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No.....

In the
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KEITH E. ELLIS, LINDA ELLIS, DENNIS HODNETT, SANDRA W. HODNETT AND THOMAS L. CURRY,
Petitioners,

vs.

CONSOLIDATED DIESEL ELECTRIC CORPORATION and CONDEC CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on November 18, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was not published and appears in Appendix A of this Petition. The order granting the Defendants' Motion for Summary Judgment issued by the Trial Court appears in Appendix B of this Petition.

JURISDICTION

The Petitioners are seeking a Writ of Certiorary to the United States Court of Appeals for the Tenth Circuit in order to review a

judgment entered on November 18, 1988. No Petition for Rehearing was filed. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED IN THIS CASE

1. Title 28, United States Code, Federal Rules of Civil Procedure 56, provides in pertinent part that:

"supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

"the judgment sought shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

The Petitioners Keith Ellis and Linda Ellis filed a products liability lawsuit against the Respondents and two other Defendants in the United States District Court for the Northern District of Oklahoma on December 28, 1984. On March 27, 1985, Petitioners, Dennis Hodnett and Sandra Hodnett and Thomas L. Curry, filed a similar lawsuit against each of the Respondents and other Defendants. The cases were consolidated by Order of the United States District Court for the Northern District of Oklahoma on April 15, 1985.

Petitioners alleged that they were injured in a one vehicle accident on June 7, 1984, while on duty with the Oklahoma National Guard. The Petitioner Hodnett was driving the vehicle and Ellis and

Curry were passengers. Apparently, Hodnett fell asleep, the vehicle left the roadway and struck a concrete abuttment. Upon impact, the fuel tank erupted and the battery burst, causing sparks to be thrown about which ignited the diesel fuel and caused a flash fire. As a direct result, all three Petitioners sustained severe and disfiguring permanent burn injuries.

Petitioners alleged the vehicle in question was designed by the Defendants Vought Corporation and LTV Corporation, and manufactured and originally distributed by the Respondents. Petitioners further contended the vehicle was defective because the battery was placed directly on top of the fuel tank, with both the battery and fuel tank being located on the exterior of the vehicle and subject to direct contact with other objects.

The Respondents and other Defendants filed Answers invoking or raising the so-called government contractor defense. The Respondents asserted they were immune from liability because they designed the Gama Goat for the military, that the military had approved reasonably precise design specifications and there were no dangers in the use or design of the Gama Goat known to the Defendants but not known to the United States Government. On or about September 3, 1985, Respondent filed a Motion for Summary Judgment. Attached to the Motion and Brief were six volumes of exhibits jointly filed by the Respondents and other Defendants.

Petitioners responded to the Motions for Summary Judgment with an Affidavit from two expert witnesses. The Respondents and other Defendants then deposed the Petitioners' expert witnesses.

In their response, Petitioners presented competent, uncontroverted testimony that the Gama Goat vehicle was unreasonably dangerous due to a design defect which allowed the batteries to be

placed on top of the fuel tanks. The Petitioners' expert stated that the danger of the design lies in the fact that there is a very hazardous fuel source located directly below a potential hazardous ignition source. Petitioners' expert went on to testify that the fire and burn injuries in the instant case were caused by sparks from the battery which ignited diesel fuel which had spewed from the fuel tanks when they ruptured on impact.

The Petitioners' expert further testified that she had been previously hired as a consultant by the United States Army to work on a project involving the retrofitting of helicopters with a crashworthy fuel system. She testified that the Army had very little expertise in that area and that the Army relied on the contractor for that expertise. She further established herself as an expert in the field of crashworthiness. She stated she was familiar with the field of crashworthiness testing at the time the Gama Goat was being developed and tested, she rendered an opinion that the Army probably did not have the personnel with experience in the field of vehicle design to appreciate the dangers posed by the defective design in question.

The Respondents submitted no affidavit or deposition evidence concerning its knowledge or lack of knowledge concerning the alleged design defect in the Gama Goat. The only evidence submitted by the Respondents was an affidavit from someone who examined and supervised the repair of approximately fifty Gama Goats which had been involved in various types of accidents. The gist of this affidavit was that none of the accidents which he was familiar with involved the fuel tank separating from the hull of the vehicle or the battery separating from the fuel tank. In other words, he stated that there had not been a previous accident like the one Petitioners were in that involved a Gama Goat vehicle. However, no other employee of the Respondents testified that the Respondents were knowledgeable or

not knowledgeable concerning the defect in question. Furthermore, the Respondents failed to submit any evidentiary material from any person with personal knowledge concerning the Army's level of expertise in this particular field. The other Defendants submitted several affidavits from a number of persons who were employed by the Army Tank Automotive Command (TACOM) and the Army Test and Evaluation Commmand (TECOM). It should be noted that these affidavits failed to contain any reference to the qualifications, expertise or competence of the United States Army in the area of vehicle design or crashworthiness. In other words, there were simply no indication in the affidavits that the Army did or did not have the knowledge to appreciate and understand the alleged design defect in question.

Finally, there was no affidavit or deposition testimony from any witness that the danger in question was open and obvious. In fact, the only witnesses who testified there was a design defect were the Petitioners' witnesses. In its original Brief in support of its Motion for Summary Judgment, the Respondents argued that because the battery and fuel tank were on the outside of the vehicle, the danger caused by that design concept was "open and obvious".

The Trial Court sustained the Motions for Summary Judgment on August 1, 1986. A timely Notice of Appeal was filed in the United States Court of Appeals for the Tenth Circuit. The parties thereafter requested the Tenth Circuit Court of Appeals to hold the Appeal in obeyance until such time as this Court ruled on the *Boyle* case. The parties then briefed the remaining issues left on appeal and oral argument was had. On November 18, 1988, the Tenth Circuit Court of Appeals, in an unpublished one paragraph opinion, affirmed the Trial Court's Order sustaining the Motions for Summary Judgment.

BASIS FOR FEDERAL JURISDICTION OF DISTRICT COURT

Jurisdiction was invoked in the District Court pursuant to 12 O.S. § 1332. There was complete diversity of citizenship between the Petitioners and Respondents and other Defendants.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS RECENTLY HELD THAT IN ORDER FOR STATE LAW TO BE DISPLACED IN A PRODUCTS LIABILITY ACTION INVOLVING MILITARY EQUIPMENT, THE SUPPLIER OF THE EQUIPMENT MUST SHOW THAT IT WARNED THE UNITED STATES OF DANGERS IN THE USE OF THE EQUIPMENT KNOWN TO IT BUT NOT KNOWN TO THE UNITED STATES. THE PETITIONERS PRESENTED COMPETENT EVIDENCE TO DEMONSTRATE A DESIGN DEFECT IN THE MILITARY EQUIPMENT IN QUESTION. THE RESPONDENTS FAILED TO SHOW THEY LACKED KNOWLEDGE OF THE DEFECT. THE RESPONDENTS ALSO FAILED TO SHOW THAT THE UNITED STATES ARMY HAD ACTUAL KNOWLEDGE OF THE DEFECT. RATHER, THE TRIAL COURT HELD THAT IT WAS NOT NECESSARY FOR THE SUPPLIER TO WARN THE ARMY OF POTENTIAL DANGERS IN THE USE OF THE MILITARY EQUIPMENT IN QUESTION BECAUSE THE ARMY WAS "CAPABLE OF BEING KNOWLEDGEABLE" CONCERNING THE DANGERS IN THE USE OF THE EQUIPMENT AND FURTHER, THE DEFECT OR HAZARD WAS "OPEN AND OBVIOUS."

ACCORDINGLY, THIS WRIT MUST BE GRANTED BECAUSE THE TRIAL COURT ENGAGED IN AN UNAUTHORIZED DEPARTURE FROM THIS COURT'S HOLDING IN *BOYLE VS. UNITED TECHNOLOGIES*, 108 S.Ct. 2510 (1988) THE *BOYLE* CASE DOES NOT MAKE ANY PROVISIONS FOR THE SUPPLIER TO BE EXCUSED FROM ITS

DUTY TO WARN BASED ON A FINDING BY THE TRIAL COURT THAT THE UNITED STATES IS "CAPABLE OF BEING KNOWLEDGEABLE" ABOUT AN ALLEGED DEFECT. FURTHERMORE, THE TRIAL COURT DEPARTED FROM THE STANDARD GOVERNING MOTIONS FOR SUMMARY JUDGMENT AND INVADED THE PROVINCE OF THE JURY BY FINDING AS A MATTER OF LAW THAT THE ALLEGED DEFECT WAS "OPEN AND OBVIOUS".

In *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), this Court placed the initial responsibility or burden of demonstrating entitlement to Summary Judgment on the party seeking same. In a case decided the same day, this Court also discussed the responsiblity of the Trial Judge in ruling on a Motion for Summary Judgment. For instance, this Court stated that in ruling on a Motion for Summary Judgment,"the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). This Court went on to state that "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to drawn in his favor." 106 S.Ct. at 2513 (citations omitted).

The defense raised by the Respondents is an affirmative defense. Accordingly, the Respondents would have had the burden at trial to prove each and every element of the defense. The Petitioners would have had no responsibility to establish the non-applicability of this defense until such time as the Defendants established the defense in their case in chief. Therefore, the Respondents initial burden of demonstrating entitlement to summary judgment is somewhat different

than that of the Defendant in the *Celotex* case since the Defendant in that case did not move for summary judgment on an affirmative defense.

In the instant case, the Trial Court simply failed to force the Respondents to meet their original burden of demonstrating entitlement to summary judgment. Specifically, the Respondents failed to come forth with sufficient, competent and admissable evidence to deomonstrate that Respondents warned the United States of dangers in the use of the Gama Goat. Since there was no warning, the Respondents then had to show they either lacked knowledge of the dangers in the use of the equipment or that the Army had knowledge of the danger in the use of the equipment and did not need to be warned.

With respect to the nature and extent of the Respondents' knowledge, there was absolutely no affidavit or other evidentiary material submitted to the Court to show whether the Respondents did or did not know of the dangers in the use of the Gama Goat. The only evidentiary material submitted by the Respondents dealt with the repair of Gama Goat vehicles which had been in accidents. This evidence is not competent to support a finding of complete lack of knowledge on behalf of the Respondents concerning the alleged defect and dangers in the use of the Gama Goat. Petitioners did not have the burden of proving that Respondents knew of the dangers involved in the use of the equipment. Rather, Respondents had the burden to come forward and show lack of knowledge. Since Respondents failed to demonstrate lack of knowledge of the dangers involved in the use of the Gama Goat, their duty to warn the United States Army of the dangers involved could only be waived if the Respondent showed that the Army had actual knowledge of the dangers involved.

From reading the Trial Court's Opinion (Appendix B), it is clear that the Army did not have actual knowledge of the dangers in the use of the equipment. Rather, the Trial Court rested its decision to absolve the Respondents from their duty to warn the Army of the dangers involved in the use of the Gama Goat because the Trial Court felt that TACOM was "capable of being knowledgeable" of the hazards and dangers involved. This is a radical departure from this Court's holding in *Boyle*. This Court held that the supplier had to warn the Army of dangers in the use of the equipment known to the supplier but not known to the United States. Nowhere in the Opinion does the Court say that a supplier does not have to warn the Army of dangers that the Army is capable of being knowledgeable about. In effect, this imposes a knew or should have known, or constructive knowledge standard upon the Army. Had this Court wished to impose that standard on either the supplier or the Army it should have so stated in the *Boyle* case. If the Court is going to impose that standard, then it should announce that decision in this case. If the Court is not going to impose that standard, then the Trial Court's Order sustaining the Motions for Summary Judgment was erroneous.

The Trial Court also held the Respondents did not have to warn the Army of the design defect or danger in the use of the Gama Goat because the hazard was "open and obvious". Clearly, the Trial Court cannot make such a determination on a Motion for Summary Judgment. Whether a defect in a products liability case is open and obvious is almost always a question for a jury to decide. In *Anderson v. Liberty Lobby, Inc.*, Supra, the Court expressly prohibited judges from weighing evidence and drawing legitimate inferences from the facts when ruling on Motions for Summary Judgment. 106 S.Ct. at 2513. Yet that is precisely what the Trial Court did in this case.

The Court apparently reasoned that since the battery and fuel

tanks were on the exterior of the vehicle and could readily be seen by all persons, that the danger must unquestionably be open and obvious. However, that is an inference which must be drawn by the Jury, not the Judge on a Motion for Summary Judgment. Clearly then, the Trial Court departed from the standards and procedures governing Motions for Summary Judgment and invaded the province of the Jury. Whether the defect in question is open and obvious should be a question for a Jury to decide under proper instruction from the Court. It is interesting to note the only reference in the Trial Court to this being an open and obvious danger was that contained in the Brief of the Respondents in support of their Motion for Summary Judgment. Therefore, the Respondents on one hand say there is no danger or defect in the Gama Goat and on the other hand say that there is an open and obvious defect. Since the very issue was controverted by the Respondents' own pleading, it is clearly impermissable for the Court then to rule as a matter of law that there was a defect and it was open and obvious.

CONCLUSION

This Court has set forth the requirements which a military contractor or supplier must meet in order to escape liability in tort for designing unreasonably dangerous military equipment. This Court had made it very clear that in order for State law to be displaced certain requirement must be met. The last of these requirements is that the supplier must warn the United States about dangers in the use of the equipment known to the supplier but not known to the United States. This is an affirmative defense which must be plead and proved by a Defendant in a run-of-the-mill products liability case.

Therefore, in order for a defendant (such as the Respondents in this case) to prevail in a Motion for Summary Judgment, it must

bear the burden of persuasion. In order to meet that burden, the military supplier or defendant must show that it warned the United States of dangers in the use of the equipment known to the supplier but not known to the United States. If the supplier contends there are no defects to warn about, it must bear the burden of proving that as well. If the supplier contends that it did not know of any competent, admissable evidentiary material to that effect. In the instant case, the Respondents failed to submit any evidence which would justify the Trial Court in finding that the Respondents did not know of the dangers in the use of the Gama Goat. Where the supplier seeks to be absolved from warning the Army of dangers in the use of the equipment for the reason that the Army or the United States knew of the dangers involved, then there must be competent, admissable evidence submitted showing that the Army had actual knowledge of the dangers in the use of the equipment. Again, there is absolutely no competent, admissable evidence to demonstrate the Army's knowledge of the design defect in the Gama Goat.

The Trial Court in this case fashioned a new, less stringent test which would absolve the supplier from its duty to warn when it can be shown that the United States is "capable of being knowledgeable" about the dangers in the use of the equipment. Does that mean if there is someone on the payroll of the United States Government somewhere in the world that may possess knowledge of the dangers in the use of a particular piece of equipment that that knowledge can be imputed to the entire United States Government or particular agency which is purchasing the equipment in question? Does it mean that the supplier can be absolved from liability if the Army is capable of hiring someone or consulting with someone to advise it on the dangers in the use of the equipment? The new test fashioned by the Trial Court raises more questions than it answers. It is such a radical

departure from this Court's holding in *Boyle* that it calls for this Court to grant the Writ of Certiorari in this case to set the record straight and set forth the appropriate standard of knowledge which the Army must possess in order for the supplier to be absolved from its duty to warn.

Finally, the Trial Court's finding that the defect in question is open and obvious is clearly improper. That is certainly a question for a jury to decide under proper instruction. This is particularly true in light of the fact that there is a factual dispute concerning the existence of a defect in the first place. The Court's finding of a open and obvious defect simply because the battery and fuel tank are on the exterior of the vehicle is without question an invasion of a Jury's province and constitutes the type of impermissable weighing of evidence and drawing of inferences that this Court has expressly prohibited.

Accordingly, the Petitioners request this Court to grant the Petition for Writ of Certiorari and to reverse the decision of the Trial Court and the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Nov. 18, 1988]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

KEITH E. ELLIS, LINDA ELLIS, DENNIS HODNETT, SANDRA W. HODNETT, and THOMAS L. CURRY,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 86-2334 (D.C. No 84-C-1029-B) (N. Dist. Okla.)
CONSOLIDATED DIESEL ELECTRIC CORPORATION AND CONDEC CORPORATION,	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT

Before MCKAY, SEYMOUR, and BALDOCK, Circuit Judges

SEYMOUR, Circuit Judge

Plaintiffs appeal the district court's grant of summary judgment in favor of defendants Consolidated Diesel Electric Corporation and Condec Corporation. We have reviewed the record and the briefs, and have heard oral agrument. Applying the legal standards set out in *Boyle v. United Technologies Corp.*, 108 S.Ct. 2510 (1988), we agree with the district court that plaintiffs have failed to raise a genuine issue of fact precluding summary judgment in favor of Consolidated.

Accordingly, the judgment of the district court is affirmed.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

APPENDIX B

[Filed Aug. 1, 1986]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH E. ELLIS and LINDA ELLIS,	)	
Plaintiffs,	)	
v.	)	No. 84-C-1029-B
CONSOLIDATED DIESEL ELECTRIC CORPORATION, a foreign corporation, CONDEC CORPORATION, a foreign corporation, VOUGHT CORPORATION, a foreign corporation, and LTV CORPORATION, a foreign corporation,	)	
Defendants	)	
DENNIS HODNETT AND SANDRA W. HODNETT,	)	
Plaintiffs,	)	
v.	)	No. 85-C-302-B
CONSOLIDATED DIESEL ELECTRIC CORPORATION, et al.,	)	
Defendants.	)	

[APPENDIX]

THOMAS L. CURRY	)	
	)	
Plaintiff,		
	)	
v.	)	No. 85-C-303-B
	)	
CONSOLIDATED DIESEL ELECTRIC CORPORATION, et. al.,	)	(CONSOLIDATED UNDER 84-C-1029-B)
	)	
	)	
Defendants.	)	

ORDER SUSTAINING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs in these consolidated cases filed in late 1984 and early 1985 seek damages for alleged personal injuries from a one-vehicle accident on June 7, 1984, on Interstate 40 east of Roland, Oklahoma. The plaintiff, Dennis Hodnett, was driver of the vehicle in which plaintiffs Keith E. Ellis and Thomas L. Curry were passengers. It is alleged that the driver apparently fell asleep, losing control, which caused the vehicle to crash into a concrete abutment resulting in a flash fire and injuries to plaintiffs. At the time of the accident the injured plaintiffs were on active military duty in the Oklahoma Army National Guard and the subject vehicle was a specialized military vehicle known as a "Gama Goat".

Plaintiffs' action sounds in product (strict) liability, it being alleged that the vehicle was defectively designed and manufactured by the defendants Consolidated Diesel Electric Corporation ("Consolidated"), Condec Corporation ("Condec"), Vought Corporation ("Vought") and LTV Corporation ("LTV"). The alleged defect making the vehicle unreasonably dangerous is that it was designed and manufactured with its batteries mounted on top of fuel tanks located on the outside of the vehicle and further that they were not properly protected to prevent fires from direct contact.

The defendants have moved for summary judgment pursuant to Fed.R.Civ.P. 56, urging that no genuine issue of fact remains for trial.

Rule 56(c) provides in pertinent part that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court of Appeals for the Tenth Circuit has stated that for summary judgment to lie " '[t]he movant must demonstrate entitlement (to a summary judgment) beyond a reasonable doubt and if an inference can be deduced from the facts whereby the non-movant might recover, summary judgment is inappropriate. ' " *Williams v. Borden, Inc.*, 637 F.2d 731, 738 (10th Cir. 1980), quoting from *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1976); *Webb v. Allstate Life Insurance Co.*, 536 F.2d 336 (10th Cir. 1976).

The Court must construe the evidence and all reasonable inferences therefrom in a light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962); *Barber v. General Electric Co.*, 648 F.2d 1272, 1276 (10th Cir. 1981); *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976); and *Machinery Center, Inc. v. Anchor National Life Insurance Co.*, 434 F.2d 1 (10th Cir. 1970).

Following a review of the entire voluminous record herein, the Court concludes the motions for summary judgment of Condec and LTV should be sustained.

I

EVIDENCE CONCERNING THE HISTORY OF THE GAMA GOAT

In 1960, the United States Continental Army Command recommended a 1¼ ton truck for future Army requirements. Essential characteristics of the vehicle included decrease in weight, increase in cargo space, improved mobility, including water floatation, and improved reliability. (Exhibit C, Foreword, p.5; Exhibit O, p.3; Exhibit N, pp. 1-2; Exhibit I, p.1).

The M561 project was initiated on June 29, 1961 (Exhibit C, P.5; Exhibit P). The Military Characteristics for the experimental

M561 (XM561) were approved in December 1961, which included air transportability. Responsibility for development of the M561 by the Army Materiel Command (AMC) was assigned to the U.S. Army Tank Automotive Command ("TACOM") (Exhibit C, p.6).

In 1960, Roger Gamaunt of LTV had conceived the idea of an all-terrain vehicle for the U.S. Army and had applied for a patent on an articulated longitudinal spine and drive shaft vehicle by which the front and rear vehicle body members were connected and LTV built a prototype ¾ ton vehicle (the "LTV Prototype") (Civiletto Affidavit, ¶7). The LTV Prototype had fuel tanks built in as an integral part of the hull (Exhibit U, p. 2). In January 1961, the LTV Prototype was demonstrated by LTV for the U.S. Army (Civiletto Affidavit, ¶8). Exhibit V is a 1961 LTV brochure proposing a vehicle *inter alia* with no external fuel tanks but two 25-gallon fuel tanks located in tank cavities beneath the seats and a single 12 volt battery compartment at the left front of the crew compartment.

TACOM developed a set of performance specifications outlining tactieal requirements for the new vehicle. They were circulated by TACOM among manufacturers and bids on a development contract were solicited. TACOM'S Research Engineering Purchase Description 62-22 (the "REPD") listed 22 engines which could be considered, all of which were larger than the Corvair engine which had been used in the LTV Prototype. (Exhibit L, REPD ¶3.10) The REPD ¶3.20 specified a 24 volt electrical system calling for two 12 volt batteries.

In response to the request for proposal (RFP), LTV submitted its proposal on March 30, 1962, which conformed to the requirements of the REPD. The LTV proposal was approved in August 1962 (Exhibit O, p. 3) and LTV was awarded the Development Contract on March 15, 1963. Pursuant to the Development Contract LTV was to follow certain plans and specifications provided by the Army to build two test rigs, and if the Army chose, pilot vehicles. (Exhibit L; Civeletto Affidavit, ¶¶ 15, 17, 18).

The Development Contract contemplated testing of the test rigs by the Army and LTV and extensive testing of the pilots by the Army

(Exhibit L, REPD ¶¶ 5-5.7, pp. 19-33) and for specific engineering tests by the Army for the mandatory requirement of safe operation of the vehicle (Exhibit L, REPD ¶¶ 5.4.2.2, pp. 22-23). There were no specific crash worthiness tests provided for in any of the contract documents relating to design and/or manufacture of the Gama Goat.

The Development Contract required Army approval or acceptance of every aspect of LTV's work, including the supplies and the end product. (Exhibit L, pp. 1, 2, 21, 10a and 10b and General Provisions pp. 2 and 13).

The Army was to approve drawings, supervise the work, approve and issue work directives and accept test rigs and pilots after inspection. (Exhibit L Schedule Exhibit "A", pp. 1, 2, 11 and 12). The pilots were to be extensively tested by the Army (Exhibit L REPD, pp. 21-32) and LTV was, as directed by the Army, to correct deficiencies and adopt suggested improvements resulting from the tests.

LTV was required by the Development Contract to move its operation from Dallas, Texas to Detroit, Michigan where TACOM was located. LTV moved its necessary people to a site near TACOM and the Army Project Management Office ("PMO"), approximately 30 people, moved into the same building as LTV in 1963. (Exhibit L, p. 12; Allshouse Affidavit, ¶6; Argo Affidavit, ¶18).

Test plans were prepared by nine Army testing agencies. Eight of the test plans provided for safety testing and evaluation. (Exhibit C, pp. D50-D149). The pilots were tested for over 200,000 miles by numerous military agencies and at numerous locations about the country. (Exhibits B, C, D, E, F, G, H and I). The testing was carried out of the pilots to discover deficiencies in the vehicles and make reports and recommendations so that changes could be made in future pilots for proper vehicle development. (Allshouse Affidavit, ¶10; Argo Affidavit, ¶10; Civiletto Affidavit, ¶¶ 17-18).

There were formal in-process review meetings involving the various interested military agencies as the vehicle development progressed. In addition, there were regular less formal meetings among TACOM, PMO and LTV and daily communication between LTV, TACOM, and the PMO. (Allshouse Affidavit, ¶¶7, 8; Argo Affidavit,

¶ 18; Zimmerman Affidavit, ¶4).

Regarding any changes made as the vehicle developed, the ultimate decisions were those of the Army. Nothing was done by LTV except at the direction of or with the concurrence of the Army. (Allshouse Affidavit, ¶13; Argo Affidavit, ¶17; Civiletto Affidavit, ¶18; Zimmerman Affidavit, ¶11; Johnson Deposition, pp. 36, 118-119 and 124-125). The Army likewise had to approve the location of the fuel tanks and batteries in their ultimate configuration and location. (Johnson Deposition, p. 147)

The XM561 as developed pursuant to the Development Contract was safety released by the Army Test and Evaluation Command ("TECOM") (Exhibit I, pp. VI-15). By type classification of the vehicle as approved for production and use by the military, the Army approved the design in June 1966. (Allshouse Affidavit, ¶¶14-15; Argo Affidavit, ¶14).

In June 1965, the Army and LTV entered into an Advance Production Engineering ("APE") Contract. LTV was to build more pilots for further testing and change as directed by the Army. (Exhibit M, pp. 1, Argo Affidavit, ¶20). Further testing, including safety Tests of the vehicles built by LTV under the APE contract brought about changes at the direction of or with the concurrence of the Army. (Allshouse Affidavit, ¶13; Argo Affidavit, ¶17; Civiletto Affidavit, ¶18). The safety release of the XM561 was extended in November 1967 to the M561 as developed pursuant to the APE contract. (Exhibit I, p. 14).

LTV then submitted to the Army a Technical Data Package ("TDP") consisting of drawing and specification for the vehicle as it had then been developed. (Argo Affidavit, ¶15; Civiletto Affidavit, ¶55). LTV was not involved in the ultimate manufacture and production of the subject vehicle herein.

Relative to the history of the location of the batteries, the batteries were originally light duty batteries and were located in the engine compartment. The Army changed the battery specification to heavy duty, back to light duty, and back to heavy duty again. (Exhibit L REPD; ¶3.20.1, p.13; Exhibit K; Exhibit P; Argo Affidavit

¶12; Civiletto Affidavit, ¶¶ 31, 37). The specification of the Army of heavy duty batteries, artic kits and a larger engine (AVM-310) contributed to the necessity to move the batteries out of the engine compartment. (Argo Affidavit, ¶¶ 7, 8, 13; Civiletto Affidavit, ¶¶ 38 and 39).

By Modification 23 dated September 15, 1964 (Exhibit Q), the Army directed LTV to relocate batteries in the engine compartment of XM561 Test Rigs 2A and 2B for Advanced Research Projects Agency ("ARPA"). Both batteries had been located on one side of the engine and obstructed access to the oil dip stick, starter motor and cold weather starting aid (Exhibit 2, p.22). Exhibit R illustrates the position of the batteries before and after.

The batteries finally specified were 6TN (Exhibit P). 6TN batteries were twice as large as the 2HN battery and contributed to the decision to move the batteries from the engine compartment to atop the fuel tanks. (Exhibit A, Argo Affidavit, ¶ 13; Civiletto Affidavit, ¶¶ 37, 39). The record does not reflect whether it was the Army or LTV that actually made the decision to move the batteries to the top of the fuel tanks but it did require Army approval.

Exhibit 3 consists of a three-page unsolicited value Engineering Change Proposal ("VECP") dated January 17, 1969 submitted by LTV to TACOM suggesting that the batteries of the M561 be relocated from their positions atop the right and left fuel tanks into the engine compartment. The reason given for the change was cost savings. Nowhere in the record is there any specific discussion of safety hazards associated with the batteries mounted on top of fuel tanks.

Exhibit A consists of a one-page document dated March 19, 1969, in which the chief of the Truck Branch Vehicle Systems Division, Development and Engineering Directorate ("CTB") of TACOM requests comments from the Chief, Light Tactical Vehicle Branch ("CLTVB") on the LTV V'P proposing that the batteries of the M561 be relocated from atop the fuel tanks exterior to the vehicle to within the engine compartment. The Chief of the Truck Branch responded that the battery location had always been controversial and recom-

mended that the LTV value engineering change proposal be rejected because if the batteries were brought into the engine compartment, they would be buried and not as accessible. He also stated the batteries located in the engine compartment would cause possible interference with removal of the air cleaner and engine filter and addition or artic and winterization kits would make the batteries inaccessible and degrade maintainability. (Exhibit A; Exhibit 3; Crawford Affidavit, ¶9; Whalley Affidavit, ¶6; Civiletto Affidavit, ¶¶51-51).

The Army issued an invitation for bids ("IFB") seeking bids on a contract to produce more than 15,000 of the vehicles to the Technical Data Package ("TDP") developed as part of the APE contract. (Argo Affidavit, ¶16; Civiletto Affidavit, ¶56; Exhibit 5). In 1967 Condec received the IFB on the construction of the new all-terrain Gama Goat vehicle for the United States Army. The design specifications were provided by the Government with the IFB. The IFB expressly provided that any bids submitted must be to construct a vehicle in strict compliance with the specifications. (Defendants' Joint Exhibits 6, pp. 16-35). Any bid not conforming to the specifications would not be considered. (Defendants' Joint Exhibit 5, p. 7481 [Bates #]; Defendants' Joint Exhibit 6, pp. 12, 1 , 17). Condec was awarded the contract for production of the M561 Gama Goat Vehicle on September 18, 1967, approximately four years after going through the design and pilot vehicle production phase.

Condec was not involved in the design of the Gama Goat's fuel and electrical systems. (Exhibits A and B). Condec manufactured the vehicles in compliance with the Government specifications and plans, including those pertaining to the electrical and fuel systems. (Exhibit C). The manufacturing process was strictly scrutinized by representatives of the Defense Contract Administration Service ("DCAS") to assure that the specifications were followed. Production of the Gama Goat commenced in 1968 and ceased in 1973. The subject Gama Goat involved herein was number 954C and was manufactured at Condec's Charlotte, North Carolina manufacturing facility in late 1970 and early 1971. It was accepted by the Army on January 6, 1971, following an inspection and a determination it compiled with the Government's specifications. There were no manufacturing defects (Johnson

Deposition p. 221).

The particular vehicle involved herein was in service until June 7, 1984, the date of the accident. A few in excess of 15,000 Gama Goats were manufactured by Condec. Over the approximately fifteen years in which various Gama Goats were involved in accidents, none involved a fire in the electrical or fuel system. (Exhibit E to Condec's Memorandum of Law of September 3, 1984; Transcript of Proceedings, January 3, 1986, p. 9).

The affidavit of Civiletto states that at the time of the design and production of the pilot vehicles LTV was not aware of any hazards associated with the location of the electrical system and the fuel tanks. (p. 13).

It is the contention of plaintiffs that affidavits of engineers Lehman and Johnson join issue with material facts above and this prevents granting a summary judgment for defendants. Specifically, Lehman's affidavit states the Army's approval was "strictly technical", suggesting that it was not a detail approval and acceptance of all design specifications. Johnson states in her affidavit that "although the Army may have inspected and approved the design submitted by LTV and the finished product submitted by Condec", it did not have the knowledge or expertise to understand the consequences of approving the hazardous and dangerous vehicle. (Johnson Deposition, p. 21).

Neither engineers Johnson nor Lehman were involved in the development or production of the subject vehicle. Neither had any experience with the Army or TACOM concerning ground wheel or track vehicle design and production, nor were they knowledgeable concerning the expertise of TACOM or TECOM. Many relevant documents were not furnished engineers Lehman and Johnson.

The conclusions or opinions of an expert are no better than the underlying facts upon which they are based. *Lee Way Motor Freight v. True.*, 165F.2d38 (10th Cir. 1948); *F.W. Woolworth Co. v. Davis*, 41F.2d 342 (10th Cir. 1930); *Downs v. Longfellow Corporation*, 351 P.2d 999 (Okla. 1960); *McNamara v. American Motors Corp.*, 247 F.2d 445 (5th Cir. 1957); *Smith v. General Motors Corporation*, 227

F.2d 210 (5th Cir. 1955); *Finney v. Ford Motor Company*, 331 F.Supp. 321 (W.D.Pa. 1971); *Wieser v. Chrysler Motors Corporation*, 69 F.R.D. 97 (E.D.N.Y. 1975); *Mustang Fuel Corporation v. Youngstown Sheet & Tube Co.*, 516 F.2d 33 (10th Cir. 1975); *Stevens v. Barnard*, 512 F.2d 876 (10th Cir. 1975); and *Thomspon v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 401 F.Supp. 111 (W.D.Okla. 1975). The ultimate opinions expressed by the witnesses Lehman and Johnson are contrary to the facts reflected in the record, i.e., the Army's approval of the Gama Goat was not "strictly technical" and the Army's expertise in TACOM and TECOM was insufficient to be aware of such hazards.

F.R.Civ.P. 56(e) provides in pertinent part:

". . . affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

A party opposing summary judgment cannot rest on mere allegations or denials but must, by affirmative response and affidavits or otherwise, set forth specific facts of which the affiant is knowledgeable showing that there is a genuine issue for trial. *Prochaska v. Marcoux*, 632 F.2d 848 (10th Cir. 1980), *cert. denied* 451 U.S. 984 (1981). Therefore, such evidence is not sufficient to create a fact question herein and summary judgment is appropriate. *Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775 (June 24, 1986).

THE APPLICABLE LAW

LTV and Condec urge that the undisputed facts of this case require application of the government contract defense as set forth in *In re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1046 (E.D.N.Y. 1982), *cert. denied* 104 S.Ct. 1417 (1984) and *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert denied*, 104 S.Ct. 711 (1984), and dictate the granting of the defendants' motions for summary judgment pursuant to F.R.Civ.P. 56. *McKay v. Rockwell International Corp.*, *supra*, sets out the following four elements that must be satisfied for the government contract defense to be applicable:

1. The United States is immune from liability under the cases of *Feres* and *Stencel*[1];

2. The supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment;

3. The equipment conformed to those specifications; and

4. The supplier warned the United States about patent errors in the Government's specifications or dangers involved in the use of the equipment that were known to the supplier but not to the United States.

The *Agent Orange* court briefly stated the purpose of the government contractor defense as follows:

> "The purpose of a government contract defense . . . is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decision of whether, when and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts. As indicated in the text, considerations of public policy require that a supplier of weapons to the government has two duties: (1) to comply with the specifications imposed by the government, and (2) to see that the government is apprised of any risks or hazards related to the weapon of which the supplier has knowledge. Given those two conditions, a supplier to the government under specifications established by the government, is ex-

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[1]The *Feres-Stencel* doctrine stems from two cases: *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950) (holding that a service man cannot recover from the Government for service related injuries) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054 (1977) (holding that a third party also could not recover from the Government damages it paid to another for services related injuries). The *Feres-Stencel* doctrine is the forerunner and connecting link to the modern government contractor defense.

empt from liability whether the theory of the claim be negligence or strict products liability."

534 F.Supp. at 1054, n. 1.

Other circuits have approved the *McKay* criteria of the government contract defense. *In re Air Crash Disaster at Mannheim, Germany on September 11, 1982*, 769 F.2d 115 (3rd Cir. 1985); *Koutsoubos v. Boeing Vertol Division of the Boeing Company*, 755 F.2d 352 (3rd Cir. 1985); *Tillett v. J. I. Case*, 756 F.2d 591 (7th Cir. 1985). Recent Fourth Circuit cases approving the government contract defense and the *McKay* criteria are *Tozer v. LTV Corporation*, 792 F.2d 403 (4th Cir., 1986); *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986); and *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986).

When the fact situation herein is viewed from the four *McKay* criteria, each is satisfied. The United States is immune from liability under the *Feres-Stencel* doctrine. The United States either established or approved reasonably precise specifications for the allegedly defective Gama Goat, military equipment. The Gama Goat involved herein manufactured by Condec conformed to the Government's precise specifications; and the alleged defect herein was not one that was known to the supplier but not to the United States.

The placement of each battery on top of each external fuel tank was open and obvious. (Defendants' Joint Exhibit 7A to 7F and 8A through 8LL). It is not required to warn of open and obvious dangers. *Burton v. L. O. Smith Foundry Product Co.*, 529 F.2d 108 (7th Cir. 1976); *Marshall v. Ford Motor Co.*, 446 F.2d 712 (10th Cir. 1971); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Mayberry v. Akron Rubber Machinery Corp.*, 483 F.Supp. 407 (N.D.Okla. 1979); *Lambertson v. Cincinnai Corp.*, 257 N.W.2d 679 (Minn. 1977); *Doran v. Pullman Standard Car Mfg. Co.*, 45 Ill. App.3d 981, 4-Ill.Dec. 504, 360 N.E.2d 440 (Ill. 1977); *Dixon v. Outboard Marine Corp.*, 481 P.2d 151 (Okla. 1971); *Berry v. Porsche Audi, Inc.*, 578 P.2d 1195 (Okl. 1978); and *Nicholson v. Tacker*, 512 P.2d 156 (Okla. 1973).

TACOM was capable of being knowledgeable concerning potential dangers related to the proximity of batteries to fuel tanks. Plain-

tiff's experts, Johnson and Lehman, and their opinions that TACOM would have changed the design had it been aware of the safety problems is conjectural and conclusory without support in the record. TACOM specifically rejected the proposal of LTC to move the batteries under the hood because of TACOM's desire for ease of maintenance of the preferred larger batteries to facilitate the vehicles' military applications.

The plaintiffs urge that the government contractor defense should not be applied to this case and that the general product liability law as established in Oklahoma in *Kirkland v. General Motors*, 521 P.2d 1353 (Okla. 1984) should apply.

The plaintiffs contend that if the government contractor defense rule applies, that the recent case of *Shaw v. Grumman Aerospace Corporation*, 778 F.2d 736 (11th Cir. 1985), and its stated criteria should be used. *Shaw* was an action brought against an aircraft manufacturer under the Death on the High Seas Act, 46 U.S.C. §761 *et seq.* and federal admiralty law, 28 U.S.C. §1333. The Eleventh Circuit held that the "military contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with soverign immunity, but because traditional separation of powers doctrine compels the defense."[2] *Shaw* acknowledged the rationale behind the government contractor defense is that the military should make decisions exclusively regarding the preparation for and waging of war, such decisions being shielded from review by civilian courts. *Shaw* holds that before a government contractor can successfully assert such shield it must show that the military's decision to use a defective product was done

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[2]In *Shaw* the court concluded the government contractor defense was not available to the aircraft manufacturer, Grumman, because Grumman participated more than minimally in the product or parts of products shown to be defective and further that Grumman was aware of the defect and had chosen to approach it as a maintenance problem rather than a design defect requiring an improved design. The evidence established that the defect was the loss or failure of a bolt in the "stabilizer actuation system" which caused the aircraft to go out of control immediately following catapult launch.

knowingly and purposefully.

Shaw fashioned a different government contractor defense criteria than *McKay* in the disjunctive as follows:

> "(1) That it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design."

Under the above quoted *Shaw* criteria, Condec could successfully assert the government contractor defense because it did not participate or participated only minimally, in the part of the product alleged to be defective. Further, herein LTV would be shielded under *Shaw* because the military, being aware of any alleged obvious hazards or dangers, authorized the contractor to proceed with the placement of the batteries on top of the external fuel tanks.

The Oklahoma Supreme Court has not specifically passed upon the government contractor defense. Two Oklahoma cases, not decisive on the question, are discussed by the parties. In *Garrett v. Jones*, 200 P.2d 402 (Okla. 1948), the defendant entered on plaintiff's land under a contract with the Government. The court held that the plaintiff's remedy was in condemnation, and not directly against the defendant, because the defendant was executing the will of the Government.

In the case of *Stiers v. Mayhall*, 248 P.2d 1047 (Okla. 1952), the defendant constructed a bridge under a contract with the Government and was found liable for negligence in the process of construction as an independent contractor.

In the case of *Williams v. Borden*, 637 F.2d 731 (10th Cir. 1980), the court stated that in deciding what the Oklahoma courts would probably do, there is justification in examining decisions from other jurisdictions. Other circuits have applied the government contract defense in similar cases as is reflected in the following: *Burgess v. Colorado Serum Company, Inc.*, 772 F.2d 844 (11th Cir. 1985); *Bynum v. FMC Corporation*, 770 F.2d 556 (5th Circ. 1985); *In re Air Crash*

Disaster at Mannheim, Germany on 9/11/82, 769 F.2d 115 (3rd Cir. 1985); *Tillett v. J. I. Case*, 756 F.2d 591 (7th Cir. 1985); Koutsoubos v. Boeing Vertol Division of the Boeing Company, 755 F.2d 352 (3rd Cir. 1985); *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986); *Dowd V. Textron*, 792 F.2d 409 (4th Cir. 1986); *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986); *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 711 (1984); and Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3rd Cir. 1982).

A majority of the state courts that have considered the government contract defense under state law have adopted it. Tillett v. J. I. Case, supra; Brown v. Caterpillar Tractor Co., supra; Hunt v. Blasius, 55 Ill.App.3d 14, 370 N.E.2d 617 (1977), aff'd, 74 Ill.2d 203, 384 N.E.2d 368 (1978); Sanner v. Ford Motor Company, 144 N.J.Super. 1, 364 A.2d 43 (1976), aff'd, 154 N.J.Super. 402, 381 A.2d 805 (1977), cert. denied, 75 N. . 616, 384 A.2d 846 (1978); and Casabianca v. Casabianca, 104 Misc.2d 348, 428 N.Y.S.2d 400 (1980).

The policy concept supporting the government contract defense is that Government approved or directed design specifications for military equipment gives rise to a uniquely federal interest sufficient to impose federal law. The overriding federal interest requires that exclusive control over matters of military equipment remain with the Executive and Legislative branches of the federal government. Federal interests could be frustrated by the application of state law.

For the above reasons, this Court accepts the McKay analysis which is an application of the federal common law and an extension of the Feres-Stencel doctrine. The Court does not choose to apply the Shaw v. Grumman criteria as it is a single circuit, while numerous other circuits considering the government contract defense have applied the McKay criteria.[3]

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[3]In view of the Court's application of the government contractor defense herein, it is not necessary for the Court to engage in a conflicts of law analysis because the subject vehicle was manufactured in the State of North Carolina and consider the "significant contacts' test as applied in *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974), and *Bruce v. Martin-Marietta Corp.*, 418 F.Supp. 829 (W.D. Okla. 1975), *Bruce v. Martin-Marietta Corp.*, 418 F.Supp. 837 (W.D. Okla. 1975), *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976). Neither is it necessary for the Court to determine whether or not LTV in supplying design and engineering services (not manufacturing or selling the product itself) could be liable herein under the product liability rule of *Kirkland v. General Motors Corp.*, *supra*, or the Restatement, Torts 2d § 402A.

For the reasons stated above, the motions for summary judgment of the defendants LTV and CONDEC are hereby sustained. A separate Judgment in keeping with the order herein shall be entered contemporaneous herewith.

DATED this 1st day of August, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE